

SERVICE DATE – DECEMBER 20, 2013

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35081 (Sub-No. 2)

CANADIAN PACIFIC RAILWAY COMPANY, ET AL.—CONTROL—DAKOTA  
MINNESOTA & EASTERN RAILROAD CORP., ET AL.

Digest:<sup>1</sup> The State of South Dakota, by and through its Department of Transportation (State), has filed a petition asking that the Board enforce certain representations the Canadian Pacific Railway Company allegedly made as part of an acquisition the Board approved in 2008. This decision allows the State to engage in discovery and provides for supplemental filings by these parties.

Decided: December 19, 2013

In 2007, Canadian Pacific Railway Company (CP), Soo Line Holding Company (Soo Holding), Dakota, Minnesota & Eastern Railroad Corporation (DM&E), and DM&E's wholly owned rail subsidiary, Iowa, Chicago & Eastern Railroad Corporation (IC&E), sought approval under 49 U.S.C. §§ 11321-26 for CP's acquisition of indirect control of DM&E and IC&E through ownership of DM&E/IC&E stock by Soo Holding.<sup>2</sup> The Board approved the acquisition, subject to conditions, in Canadian Pacific Railway—Control—Dakota, Minnesota & Eastern Railroad, FD 35081 (STB served Sept. 30, 2008).

On August 8, 2013, the State of South Dakota, acting by and through its Department of Transportation (State), filed a petition requesting that the Board enforce three investment representations allegedly made by CP as part of the acquisition proceeding. Specifically, the State claims that: (1) CP represented that it would invest \$300 million in the first three post-acquisition years; (2) CP, in clarification, represented that it would invest \$300 million in addition to investment dollars previously budgeted by DME<sup>3</sup> in the first few years following its acquisition of DME; and (3) the Federal Railroad Administration (FRA) informed the Board that, as part of the Safety Integration Plan (SIP) process for the acquisition,<sup>4</sup> CP had represented that it

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<sup>1</sup> The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

<sup>2</sup> Hereinafter, unless otherwise noted, references to CP include affiliated corporate entities, including DM&E and IC&E.

<sup>3</sup> The State refers to DM&E and IC&E collectively as DME.

<sup>4</sup> See 49 C.F.R. Part 1106.

would expend \$300 million in the first four post-acquisition years to upgrade all of DME's track to FRA Class 3 standards.

The State asks the Board to direct CP to (1) provide investment data and other information necessary to determine whether CP has adhered to the first two representations; and (2) submit a verified statement addressing CP's view on its compliance obligations. The State further requests that the Board provide the State and other interested parties an opportunity to file comments responding to CP's submissions, and then issue an appropriate enforcement order against CP.

CP filed a reply in opposition to the relief sought by the State on August 28, 2013, in which it asserts that it has fully complied with the investment representations made in the acquisition proceeding and that there is no basis for an enforcement order against CP. The State filed a supplement to its August petition on September 20, 2013, and CP filed a reply to the supplement on October 20, 2013. The Board has also received statements and letters supporting the State's filing from a number of government agencies and representatives, individuals, and entities. Notably, in their letter of support, the U.S. Department of Transportation and FRA provide a clarification to FRA's 2008 letter to the Board. They state that upon review of the record, CP did not make a representation to FRA committing an investment of approximately \$300 million over four years to upgrade all DME track to Class 3 standards and that FRA's earlier letter amounted to an overgeneralization. Given the significance of DOT and FRA's letter and the ambiguity regarding CP's investment commitment, and to provide a full and fair opportunity for the State to obtain relevant information needed to support its petition, we will permit the State to engage in discovery at this time pursuant to the Board's rules at 49 C.F.R. Part 1114. Through discovery, the State can test the foundation of the assertions made by CP and obtain additional documentation to fully present its case.<sup>5</sup> The discovery period will end February 18, 2014, after which the State may file a supplement to its petition by March 20, 2014, and CP may file a reply by April 21, 2014. The State and CP may agree to a different procedural schedule but should notify the Board of any agreed-upon changes.

It is ordered:

1. The State may engage in discovery as discussed above.
2. The State may file a supplement to its petition by March 20, 2014, and CP may file a reply by April 21, 2014.
3. This decision is effective on its date of service.

By the Board, Chairman Elliott, Vice Chairman Begeman, and Commissioner Mulvey.

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<sup>5</sup> In response to the State's claim that CP failed to provide any underlying documentation for its asserted capital investments, CP stated in the last reply that it would provide additional support for its expenditures if the Board deemed it necessary. This particular material should certainly be made available to the State during the discovery period.